In the Supreme Court of the United States.

OCTOBER TERM, 1926.

N. & G. Taylor Co., Inc., Petitioner (Plaintiff below),

Against

John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, copartners, Respondents (Defendants below).

PETITION FOR WRIT OF *CERTIORARI* TO REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of N. & G. Taylor Company, Inc., respectfully shows unto this Court as follows:—

1. The Court which rendered the decision here in question consisted of Judges Page, Alschuler and Evans, all three of whom wrote separate opinions. The majority opinion is by Judge Page, with a concurring opinion by

Judge Alschuler. Judge Evans dissented; his dissenting opinion clearly and concisely states the principal reasons on which petitioners rely in contending both that the majority decision is erroneous and that the important question involved is one on which such confusion of thought and decision exists in the Federal courts as to call for an authoritative decision by this Court. The majority and dissenting opinions each rely on Federal decisions as sustaining their diametrically opposite conclusions.

2. The suit was brought in the Illinois District, by N. & G. Taylor Co., Inc., a Maryland corporation, against two citizens of Illinois, for breach of a written contract, made in November, 1916, to deliver to plaintiff 1,200,000 gallons of fuel oil over the following eight months.

3. Suit was begun in 1918, the declaration setting out the contract *in haec verba*. The trial was not held until 1924, more than six years after the cause of action accrued.

4. At the trial it developed that when the contract was made in November, 1916, N. & G. Taylor Company was a partnership, consisting of H. N. Taylor and W. W. Justice, Jr.; that on January 31, 1917, when defendants were in default under the contract but before its final breach, the partners had incorporated their business. The two partners had then organized the plaintiff corporation, to which they transferred all the assets of the partnership, including its rights under the contract, the corporation assuming all its liabilities. All the stock in the corporation was held by the two partners, the name remained the same with the addition of the word "Inc.," and the personnel of the organization continued unchanged. From the record it does not appear that defendants knew, until the trial, that plaintiff had ever been a partnership. From one of their letters in December, 1916, it would appear that they then believed it to be a corporation.

5. Section 18 of the Illinois Practice Act permits a suit by the assignee of a chose in action but requires that the declaration set out "how and when he acquired title."

Smith and Hurd Revised Statutes, Illinois, 1925, Chapter 110, Section 18, page 1954; quoted in full in Judge Evans' opinion.

6. The original declaration set out the written contract *in haec verba*, but did not contain an averment alleging the incorporation of the business and the assignment of the contract to the corporation. When at the trial the above facts came out, Judge Cliffe allowed an amendment inserting the above averments but then sustained a plea of the Statute of Limitations, which ruling was sustained by the majority of the Circuit Court of Appeals.

7. The basis for the majority decision is that the question involves the construction of a local statute on which the Federal courts are bound by the interpretation of the State court "however otherwise my inclination would be without the Illinois interpretation." (Judge Alschuler's opinion, Rec. p. 191.)

8. The Illinois Supreme Court has held that where a declaration lacks any averment whose absence would render it demurrable, the insertion of such averment, however technical and lacking in real information, results in the statement of a different cause of action. This rule has been followed by the Illinois courts in cases involving the insertion of averments to comply with Section 18 of the Practice Act alleging how and when an assignee acquired title to the chose in action sued on.

9. The Federal courts, on the other hand, recognize that there may be both a defective and a proper statement of the same cause of action, and that the insertion of an allegation which did not "set up any different state of facts as the ground of action" (*M. K. & T. R.* vs. *Wulf*, 226 U. S. 570, 576), does not state a new cause of action,

but "merely expanded or amplified what was alleged in support of the cause of action already asserted." (*N. Y. Cent. Ry.* vs. *Kinney*, 260 U. S. 340, 346.)

10. The position of petitioners is that the question involved is neither the construction by a State court of a State statute nor mere matter of State practice, pleadings or forms and modes of proceedings in civil cases. The Illinois decisions holding that the insertion of a necessary technical averment results in the statement of a different cause of action do not constitute a construction of Section 18 of the Illinois Act, but the pronouncement of a general rule of law of which the application under Section 18 is but an illustration. Nor do such decisions involve a question of State pleadings and practice within the meaning of Section 914 of the Revised Statutes. The pleadings as amended conform precisely to Illinois practice, the question being as to the effect of making them so conform, and as to the effect of amendments, which the Federal courts are permitted to allow liberally, under Rev. Stat., Section 954, quite independently of any State statute. Finally, even if the case did involve a question of State procedure, Section 914 does not require a slavish adherence by the Federal courts to every State practice decision where such would result in gross injustice and confusion, but permits the latitude involved in the requirement of conformity "as near as may be."

11. Pursuant to petitioner's obligation to present reasons why the present case is one which this Court should review on *certiorari*, petitioner respectfully suggests that, entirely apart from the manifest injustice which both the majority and minority recognize would otherwise result, the case involves broad principles essential to the administration of justice in the Federal Courts, the confusion as to which in the Federal Courts can be no more forcibly illustrated than by the decisions cited in the majority and minority opinions and by the fact that such eminent judges rely on Federal decisions,—some of them the same decisions,—as

supporting opposite conclusions. As said by Judge Evans at the conclusion of his dissenting opinion (Rec. p. 199):—

> "Undoubtedly, Sec. 914 R. S. was enacted to harmonize the holdings in state and Federal courts when dealing with the same subject. And there is a lack of harmony when the Federal courts of Illinois hold that a certain amendment to a pleading does not constitute a new cause of action and the state court decisions of Illinois hold that it does. The Federal court, to harmonize its decisions with the Illinois court, would, however, be getting out of harmony with the other Federal courts, and the Supreme Court of the United States. This Court of Appeals would be in the anomalous situation where it would be compelled to hold that such an amended pleading would not state a new cause of action in Indiana and Wisconsin, but would in Illinois. Greater confusion could hardly be conceived. And worse than such confusion is a decision not only contrary to the weight of authority, but one for which the court must apologize."

12. A certified copy of the transcript of record as prepared in connection with the writ of error in the Circuit Court of Appeals, together with the further proceedings had in said Court, is presented herewith.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in the said Circuit Court of Appeals in the said case entitled in that Court, N. & G. Taylor Company, Inc., a corporation, Plaintiff in Error *vs.* John A. Anderson and C. A. Gustafson, doing business under the name of Anderson & Gustafson, copartners, Defendants in Error, Number 3556, October Term, 1925, April Session, 1926; and that

the said Decree of the Circuit Court of Appeals made and entered in said case on the Fourth day of June, 1926, may be reversed by this Honorable Court and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem meet and just.

And your petitioner will every pray, etc.

N. & G. TAYLOR COMPANY, INC.,
By
H. N. TAYLOR,
President.

HENRY S. DRINKER, JR.,
Of Counsel for Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

HOLLINSHEAD N. TAYLOR, being duly sworn according to law, deposes and says that he is the President of the Petitioner corporation; that he has read the foregoing Petition and has knowledge of this litigation, and that the matters herein set forth are true to the best of his knowledge, information and belief.

H. N. TAYLOR.

Sworn to and subscribed before me this 26th day of August, 1926.

RUTHERFORD S. BATES,
[SEAL] *Notary Public*
Com. Exp. Jan. 21, 1929

I hereby certify that the foregoing petition in my opinion is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

HENRY S. DRINKER, JR.,
Of Counsel for Petitioner.

ARGUMENT.

The presence of Judge Evans' admirable opinion and his review of the cases makes extended argument unnecessary on the present petition.

The Illinois decisions relied on by the majority were not based on a construction of Section 18 of the Illinois Practice Act, but involved the pronouncement of a fundamental principle of general law,—that the addition of any averment necessary to a complete technical cause of action results in a different cause of action from that alleged without such averment. The leading Illinois cases involving this principle were cases involving the necessity, in personal injury suits against municipalities, of an averment of written notice of the injury by the plaintiff to the city within a year after the accident. The Court held that the notice was essential to the right of action and must therefore be averred, and that where the original declaration failed to contain it, an amendment after the limitation period, alleging that the notice had in fact been given, subjected the declaration to the plea of the Statute of Limitations.

Walters vs. *City of Ottawa*, 240 Ill. 259;
Prouty vs. *City of Chicago*, 250 Ill. 222.

These decisions were followed by the Illinois Court in cases involving amendments to conform to Section 18 of the Practice Act.

They did not involve the construction of the Illinois Statute nor indeed the form and mode of State procedure, but the fundamental question of general law as to what constitutes a different cause of action.

The reasoning of the Illinois Court is that since the technical averment in question is essential to a statement of a legal cause of action, and since no statement of cause of action is valid without it, its addition must result in the statement of a different cause of action. Such reasoning, as Judge Evans points out, is worthy of the Elizabethan era, but happily, is rare in modern times.

particularly in the Federal Courts which, under Section 954, "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, or by its rules prescribe."

As said *In re Griggs*, 233 Fed. 243, 246, the very purpose of Section 954 was "to free the administration of justice in the Federal Court from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits."

The Federal power is further defined by the Act of February 26, 1919, 40 St. at L. 1181:—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

When a plaintiff in the Federal Court has, from the institution of the suit, fully advised the defendant in the pleadings as to the particular transaction on which the claim is based, the Federal Courts do not permit defendant to defeat a just claim merely because of the original omission of some fact, which, while necessary to make the pleadings conform to State practice, was totally unnecessary to advise defendant adequately of the essential nature and basis of the claim.

The fundamentally different view taken by this Court as to what constitutes the allegation of a different cause of action in connection with a plea of the Statute of Limitations, and the distinction between this question and that of a matter of pleadings and forms of procedure is forcibly illustrated by the decisions in *American Railroad vs. Birch*, 224 U. S. 547, and *M. K. & T. Ry. vs. Wulf*, 226 U. S. 570.

In the first this Court held that an action under the Federal Employers Liability Act could not be maintained by the widow but only by the personal representative. In the second case the Court sustained the allowance of an amendment, after the limitation period, substituting the personal representative for the widow who had instituted the suit. The Court said that the amendment did not "set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit."

So also in *N. Y. Cent. R. R.* vs. *Kinney*, 260 U. S. 340, this Court, speaking through Mr. Justice Holmes, in dealing with the effect of an amendment inserting the essential averment that the carrier was engaged in interstate commerce, said:—

> "The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time.' *Seaboard Air Line Ry.* vs. *Renn*, 241 U. S. 290, 293. 'The facts constituting the tort were the same, whichever law gave them that effect.' *Seaboard Air Line Ry.* vs. *Kocnnecke*, 239 U. S. 352, 354. See also *St. Louis, S. F. & T. Ry. Co.* vs. *Smith*, 243 U. S. 630. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

In the case at bar, the defendants were notified in writing by the plaintiff corporation on March 20, 1917, that plaintiff intended to hold them legally responsible for the breach of the only contract which ever existed between the parties (Rec., pp. 58-9; see also letter of January 18th, Rec., p. 57).

In March, 1918, defendants were officially advised, by the suit instituted, of plaintiff's determination to hold them

liable, the declaration setting out the contract and the breach, in six counts, with every conceivable ramification.

There is no thought in this case, but that the defendants had notice of this very claim from the beginning. To permit the plea of the statute to avail defendants would be to return to the days of Lord Coke when "the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading."

Caldwell, *J.*, in *McDonald* vs. *State of Nebraska*, 101 Fed. 171, 182.

This is not a mere question of State pleading, practice or form and mode of procedure. The local requirement as to the form of the pleadings was completely satisfied and the pleadings as amended would stand the criticism of the most technical Illinois practitioner.

Finally, even if the question were one of following State procedure, the Federal Courts are not bound by Section 914 to adhere slavishly to every technicality engrafted by the State Courts into their forms of practice. The insertion by Congress into the Conformity Statute of the words "as near as may be" gave to the Federal Courts the power to reject, "as Congress expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

Van Doren vs. *Penna. R. Co.*, 93 Fed. 260, 269;
Railroad vs. *Horst*, 93 U. S. 291.

The history, purpose and effect of the liberalization of amendments in the Federal Courts are nowhere more clearly summarized than in *McDonald* vs. *Nebraska*, 101 Fed. 171, 176-182, which was cited with approval by this Court in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. p. 577, *supra*.

This was a suit by the State Treasurer of Nebraska in his official capacity, to which defendant demurred on the ground that suit should have been brought in the name of

the State. The trial Court having allowed an amendment after the period of the statute of limitations, substituting the name of the State as plaintiff, it was held that this was not error, the Court stating that the amendment made no change in the cause of action or in the real parties to the suit. In the course of the opinion Judge Caldwell said:—

> "But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesman and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring

to this section of the judiciary act, the supreme court of the United States, speaking by Mr. Justice Story, said:

" 'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy.' *Matheson's Adm'rs.* vs. *Grant's Adm'rs.*, 2 How. 263, 281, 11 L. Ed. 261.

"And Mr. Justice Miller, speaking from the Circuit Bench, declared:

" 'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory.'

* * * * * * *

"A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. *But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of the wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff.* The name of the proper plaintiff may be brought on the record at any time during the progress of the

cause, and may even be inserted after verdict and judgment. *When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations.*"

* * * * * * *

At the close of the opinion the Court contrasts forcibly the practice of the law as it was in Lord Coke's day, and as it is in the Federal Courts today:—

"There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial and technical rules governing the statement of actions and defenses—for the entire system of special pleadings was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defend-

ant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and *what is meant by substantial right is a right going to the actual merits of the case.* Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice."

The other considerations which lead to the conclusion that the majority opinion is both erroneous and conducive to confusion and the defeat of justice in the Federal Courts are so clearly pointed out in Judge Evans' opinion as to require no further comment.

Respectfully submitted,

ROBERT W. CHILDS,
WALTER E. BEEBE,
HENRY S. DRINKER, JR.,
EDWIN A. LUCAS,
For Petitioner

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Office Supreme Court.
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No. 114 OCTOBER TERM, 1927.

IN THE

Supreme Court of the United States

N. & G. TAYLOR CO., INC., Plaintiff in Error,

vs.

JOHN A. ANDERSON and C. A. GUSTAFSON, doing business under the name of ANDERSON & GUSTAFSON, Copartners, Defendants in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT W. CHILDS,
WALTER E. BEEBE,
HENRY S. DRINKER, Jr.,
EDWIN A. LUCAS,
Attorneys for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

No. 605. OCTOBER TERM, 1926.

N. & G. Taylor Co., Inc., Plaintiff in Error,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

REFERENCE TO OFFICIAL REPORT OF OPINIONS DELIVERED BY THE COURT BELOW.

The majority opinion by Judge Page is reported in 14 Fed. (2nd) 353.

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Judge Evans' dissenting opinion in 14 Fed. (2nd) 355.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(1) The judgment herein reviewed was entered January 6, 1925 (Rec. 41), and, upon review, was affirmed June 4, 1926, by the majority of the Circuit Court of Appeals (Rec. 186), Judge Evans dissenting (Rec. 191).

(2) This suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, was by a citizen of Maryland against a citizen of Illinois involving more than three thousand dollars.

The trial Court directed a verdict for defendants (Rec. 165) on the ground that the amendment allowed by said Court at the trial resulted in the statement of a new cause of action which was barred by the statute of limitations.

(3) The jurisdiction of this Court is invoked under Section 1217 of the Judicial Code, pursuant to which this Court, on petition of plaintiffs below, on November 23, 1926, granted certiorari to review the decision of the Circuit Court of Appeals (47 Sup. Ct. Rep. 237).

STATEMENT OF THE CASE.

In the Fall of 1916, N. & G. Taylor Company, then a partnership composed of Hollinshead N. Taylor and William W. Justice, was engaged in the manu-

facture of tin plate, with their principal office in Philadelphia, and their plant at Cumberland, Maryland (Rec. 107).

In November, 1916, the partnership, N. & G. Taylor Company, entered into a contract to buy from defendants their eight months' requirements of fuel oil, estimated at 1,200,000 gallons, at 5¼¢ per gallon, deliverable at plaintiffs' Maryland plant in fairly equal monthly quantities (Rec. 47).

No sooner was the contract made than a phenomenal rise began, both in the market price of oil, and in the rental price payable for tank cars to haul the oil from the refineries to plaintiffs' plant (Rec. 160, 143; 162-4).

Defendants at the outset fell behind in their deliveries, and by March 20th had delivered but 40,000 gallons—less than 6% of the quota to that date. This defendants contended was due to car shortage, while plaintiffs contended that it was due to defendants' desire to get the higher price available by delivery to other parties at the current market price, and to avoid the payment of the current premiums charged for tank cars.

The trial Judge having directed a verdict for defendants, for the purposes of the present writ of error defendants' breach of the contract must be regarded as wholly unjustified, and as attributable to their desire to reap the large profits available by the sale of plaintiffs' oil to others at enhanced prices, for delivery at nearby points, for which tank cars were more readily available.

Although defendants fell behind in their deliveries from the beginning, the actual legal breach of contract by them did not occur until March, 1917. Between November, 1916, and March, 1917, defendants from time to time shipped small quantities of oil under the contract and by their letters to plaintiffs kept holding out hope of a better performance in the future. Plaintiffs continually urged more prompt deliveries, until on March 20th, when, their patience exhausted, they wrote defendants (p. 59) that in view of defendants' failure to perform their contract, plaintiffs would buy oil elsewhere, and hold defendants for the difference in price.

Meanwhile, as of January 31, 1917, the two partners incorporated their business by securing a Maryland charter, Messrs. Taylor and Justice acquiring every share of the stock of the corporation, which took over all the partnership assets and assumed all its obligations (Rec. 138, 150-8).

No change whatever occurred in the business or in the personnel of those in charge of it (Rec. 150).

The name of N. & G. Taylor Company, under which the business had been carried on for more than 100 years, was not changed, the word "Incorporated" being merely added to it (Rec. 107).

There is nothing in the record from which it could be inferred that defendants knew, prior to the breach of contract by them in March, 1917, whether plaintiffs were a partnership or a corporation.

After February 1, 1917, and until the final breach

on March 20th, the parties continued their correspondence, plaintiffs writing on the letter heads of the corporation and instead of signing as formerly "N. & G. Taylor Company," the *letters now being signed*

"N. & G. TAYLOR CO.,
"H. N. Taylor,
"President."

The record shows at least three letters, dated February 15, February 23 and March 1, 1917, so signed (Rec. 147-149). The third of these letters so signed was specifically acknowledged by defendants in their letter of March 5, 1917 (Rec. 146).

These letters all refer to the oil shipments being made and in prospect under the existing contract between the parties.

Suit was brought March 7, 1918, by "N. & G. Taylor Company, Inc.," against defendants, for breach of this contract, the original declaration setting out, *in haec verba*, the written contract, dated November 1, 1916, between "N. & G. Taylor Company," and Anderson & Gustafson (Rec. 7-9). The original declaration having alleged that plaintiff was a Pennsylvania corporation, it was amended May 6, 1924, without objection, by changing the word "Pennsylvania" to "Maryland."

Owing to a congested docket and to a postponement requested by defendants, the trial was not held until May 12, 1924, more than six years after the cause of action accrued. It then developed from the testimony that the contract was originally made with

the partnership and assumed, prior to its final breach, by the corporation.

Section 18 of the Illinois Practice Act (hereafter quoted) permits the assignee of a chose in action to sue in his own name, but requires him to allege in his declaration that he is the actual bona fide owner thereof, and to set forth how and when he acquired title.

In order to comply with this provision and to avoid a variance, plaintiffs at the trial asked leave to amend their declaration by declaring on the identical contract as made by the partnership and assumed by the corporation.

Such amendment was actually allowed by the trial Judge over defendants' objection (Rec. 40).

The Court then directed a verdict for defendants on the latter's pleas of the Statute of Limitations (Rec. 165).

The judgment of the lower Court was affirmed June 4, 1926, by the Circuit Court of Appeals for the Seventh Circuit. Judge Page wrote the majority opinion, Judge Alschuler a concurring opinion.

Judge Evans filed a dissenting opinion.

Thereafter this Court allowed a writ of certiorari (Rec. 206).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

Plaintiff in error contends that the fundamental error of the trial Court, affirmed by the majority of

the Circuit Court of Appeals, consisted in the conclusion that the amendment stating when and how the plaintiff corporation acquired title to the cause of action sued on, resulted in the statement of a new or different cause of action after the expiration of the period of limitation.

ARGUMENT.

Summary.

The Illinois Practice Act permits the assignee of a chose in action to sue in his own name, but requires him to aver in his declaration how and when he acquired title.

An amendment to a declaration alleging that the plaintiff corporation succeeded to the rights of a partnership, after the execution of the written contract sued on, but before its final breach by defendants, does not state a new or different cause of action, but merely amplifies and expands the original averments.

The original declaration having set out, *in haec verba*, the written contract sued on, and the name, organization and personnel of the partnership remaining substantially identical after its incorporation by the two partners, who became the sole stockholders, the effect of the amendment was merely to make the pleadings comply with local practice, and

when allowed the amendment related back to the filing of the original declaration.

The Federal Courts are not bound slavishly to follow State decisions relative to the allowance, scope and effect of amendments to pleadings, this being specifically covered by Section 954 of the Revised Statutes.

The Conformity Statute does not require the Federal Courts to follow, against their better judgment, decisions of the Illinois Court to the effect that the insertion of any averment necessary to render a pleading non-demurrable results in a new cause of action. Such decisions involve but an inference from the State Practice Statutes, by which the Federal Courts are not bound.

In the Federal Courts, the test as to whether an amendment states a new cause of action is whether it sets up a different state of facts as the ground of liability. Hence, an amendment merely specifying the capacity in which the plaintiff sues, or expanding and amplifying the original averments, does not result in the statement of a new cause of action.

When in a suit in the Federal Court a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against him because of specified conduct, an amendment, necessary to make the pleading conform to State Practice, although unnecessary to advise defendant adequately of the essential nature and basis of the claim, may be allowed after the Limitation period.

Plaintiffs have fully Complied with the Requirements of Illinois Practice.

Section 18 of the Illinois Practice Act (Ill. Laws 1907, 443; Smith-Hurd Ill. Rev. St. 1925 c 110, Section 18, p. 1954) provides as follows:—

> "18. Suit on chose in action. Suit by subrogee. The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; * * *."

By the amendment allowed by the Trial Court, plaintiff has fully complied with the requirements of this provision.

Admittedly plaintiff's declaration, as amended, fully satisfied the requirements of the local practice, as construed by the Illinois Courts. The most technical Illinois practitioner could now find no fault with it.

The Illinois decisions which the majority of the Court below felt bound to follow, "however otherwise my inclination would be without the Illinois interpretation" (Judge Alschuler's opinion, R. 191) did not involve the construction of this Section 18 of the Illinois Practice Act, which is too clear for construction. These decisions did not, by construing a State statute, prescribe the form or mode of State procedure, but dealt with the question as to what con-

stitutes a different cause of action,—a matter of general fundamental law,—and with the effect of amendments,—a matter regulated by the Federal Statutes.

Prior to any question of the kind involving Section 18, the Illinois Supreme Court had held, in several cases, that where a declaration lacks any averment the absence of which would render it demurrable, the insertion of such averment, however technical and lacking in real information, results in the statement of a *different* cause of action.

These decisions were not based on Section 18 of the Illinois Practice Act. They were cases involving the necessity, in personal injury suits against municipalities, of an averment of written notice of the injury by the plaintiff to the city within a year after the accident. The Court held that the notice was essential to the right of action and must therefore be averred, and that where the original declaration failed to contain it, an amendment after the limitation period, alleging that the notice had in fact been given, subjected the declaration to the plea of the Statute of Limitations.

Walters *vs.* City of Ottawa, 240 Ill. 259;
Prouty *vs.* City of Chicago, 250 Ill. 222.

Having so held, it followed that where an original declaration lacked the averment required by Section 18 of the Practice Act, the addition of such averment by amendment resulted in a new cause of action.

Allis-Chalmers Co. *vs.* Chicago, 297 Ill. 444.

This latter decision did not involve the construction of Section 18 of the Practice Act. It merely applied to a case involving an assigned chose in action the general principle of law pronounced in the earlier cases,—that the addition of any averment necessary to a complete technical cause of action results in a different cause of action from that alleged without such averment.

At best it was, as Judge Evans clearly shows in his dissenting opinion, but an *inference* from the procedure statute, which inference the Federal Courts are not bound to follow against their better judgment, in view of the specific Federal Statutes prescribing liberality in the allowance of amendments and the decisions of this Court defining the effect of amendments of this nature.

The question in the case at bar is not one relative to the form of the pleadings, which in every respect conform to the pattern prescribed by Section 18, but as to the effect of an amendment, which is governed, not by State decisions, but by Section 954 of the Revised Statutes, as construed by this Court.

The reasoning of the Illinois Court is that since the technical averment in question is essential to a statement of a legal cause of action, and since no statement of cause of action is valid without it, its addition must result in the statement of a *different* cause of action. Such reasoning, as Judge Evans points out, is worthy of the Elizabethan era, but happily, is rare in modern times, particularly in the

Federal Courts, which, under Section 954, "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, or by its rules, prescribe."

As said *In re Griggs*, 233 Fed. 243, 246, the very purpose of Section 954 was "to free the administration of justice in the Federal Court from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts *upon their very merits.*"

The Federal power is further defined by the Act of Congress February 26, 1919, c. 48, 40 St. at L. 1181:—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

FEDERAL COURTS ARE NOT BOUND BY STATE DECISIONS RELATIVE TO THE ALLOWANCE AND EFFECT OF AMENDMENTS.

While the Illinois Courts thus apparently hold that the insertion of any essential averment results in a "new cause of action," the Federal courts, on the other hand, recognize that there may be both a defective and a proper statement of the *same* cause of action, and that the insertion of an allegation

which did not "set up any different state of facts as the ground of action" (M. K. & T. R. *vs.* Wulf, 226 U. S. 570, 576), does not state a *new* cause of action, but "merely expanded or amplified what was alleged in support of the cause of action *already asserted*" (N. Y. Cent. Ry. *vs.* Kinney, 260 U. S. 340, 346).

The power of the Courts of the United States to allow amendments, and the liberal practice adopted by them in exercising this power, do not depend on State Statutes or on State Practice, but are based on the paramount authority derived from the Federal Statutes:—

> "The right of the federal court to allow amendments under Section 954 of the Revised Statutes of the United States is well settled. The right exists quite independently of any state statute and may be exercised at any stage of the cause, even after submission, and extends to the verdict and judgment * * *."
>
> Bowden *vs.* Burnham, 59 Fed. 752, 754 (C. C. A. 8th Cir.);
>
> Mexican Cent. Ry. *vs.* Duthie, 189 U. S. 76;
>
> Illinois Surety Co. *vs.* Peeler, 240 U. S. 214, 222;
>
> Norton *vs.* Larney, 45 Sup. Ct. 145, 147.

Amendments, when allowed, relate back to the date of the filing of the pleading which they amend.

> Missouri K. & T. R. Co. *vs.* Wulf, 226 U. S. 570, 576;
>
> Underwood Co. *vs.* Davies, 287 Fed. 776, 779 (C. C. A. 5th Cir.).

Chapter 20 of the Judiciary Act of 1789 (later Section 954 of the Revised Statutes) provides as follows (Act of Cong. Sept. 24, 1789, C. 20, §32, 1 Stat. 91; Vol. 3 U. S. Compiled Statutes Annotated, Section 1591, p. 3180):—

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

THE PRESENT CAUSE OF ACTION ACCRUED DIRECT TO THE PLAINTIFF CORPORATION.

This is not a case (like the Illinois decisions relied on by the other side in the Court below) where one party to a contract, after a breach by the other, has assigned his completed cause of action to a distinct third party.

In the case at bar, the corporation stepped into the shoes of the partnership *while the contract was being performed* and before the breach was complete. The testimony in the present record was ample to justify the jury in finding that, after the formation of the corporation, it took the place of partnership in connection with the performance of the contract with defendants, and that, before the breach, contractual relations existed directly between the corporation and defendants.

The correspondence leading up to the breach was carried on between defendants and the corporation and the final breach, when it occurred in March, was with the corporation.

While defendants fell behind in their agreed deliveries prior to the reorganization, this delay was apparently acquiesced in by plaintiffs until March 20, 1917, when, plaintiffs refused further to condone defendants' scanty deliveries and wrote defendants (R. 59) that in view of defendants' failure to keep up the agreed schedule of deliveries, plaintiffs would buy this oil elsewhere and hold defendants for the difference in price. It was not until March 20, 1917, therefore, that this present cause of action accrued, and *it then accrued to the corporation*, which had taken over the business of the partnership almost two months before.

The letters from plaintiff in February and March, prior to the breach, but after the incorporation,

acknowledged by defendants, written on the letter-heads of the corporation, were signed

N. & G. TAYLOR CO.,
H. N. TAYLOR,
President.[1]

In the case at bar, there was no assignment to a distinct third party. The two partners merely changed the form of their organization. Even this change was complete before the final breach by defendants, which breach was with the plaintiff corporation.

In such a case, an amendment merely setting out the history of the transaction did not in any way change the cause of action sued on, much less introduce a *new* cause of action, but merely, in order to comply with the State Practice and to prevent a

[1] It is to be noted that even in December, 1916, before the incorporation was complete, defendants evidently did not regard plaintiff as a partnership, since in their letter of December 18th (Rec. 120), addressed to plaintiff, they say:—

> "Replying to your letter of the 14th inst., will say that we have now located the *contract with your company* which had been misplaced."

If defendants had thought plaintiff a partnership consisting of but two partners, they would naturally have said "the contract with your firm."

In this connection, reference is also made to defendants' plea to the original declaration, which alleged the contract as having been made by the corporation. To this defendants in their plea say (Rec. p. 26) "and the defendants further allege that shortly *after the making of the alleged contract* mentioned in the first and fifth counts" etc.

Here, while not admitting that the transaction in question was a contract, defendants distinctly admit that the transaction took place between them *and the corporation*.

variance between the pleadings and the proof, amplified the averments in the cause of action instituted long before the statutory period expired.

If the declaration, which set out in full the contract sued on, had alleged that it had been made on plaintiff's behalf by its President, this allegation would not be supported by proof that the Secretary had been the officer who acted for it, and an amendment would be necessary to prevent a variance, but such an amendment would obviously not introduce a new cause of action, the suit still being on the same contract, and would, of course, be allowed after the Limitation period. As in the case at bar, it would merely describe more accurately how the cause of action originally sued on arose.

It is such amendments which the Federal Courts are most liberal in allowing.

When a defendant in the Federal Court has, from the institution of the suit, been fully advised by the pleadings *as to the particular transaction on which the claim is based,* the Federal Courts do not permit him to defeat a just claim merely because of the original omission of some fact, which, while necessary to a complete technical cause of action[1] or required to make the pleadings conform to State

[1] For example, an absolute essential to a cause of action in the Federal Courts, no Federal question being involved, is the requisite diversity of citizenship, yet such an averment may be inserted by amendment after the statutory period.

Bison Bank *vs.* Billington, 228 Fed. 116;
B. & O. R. R. Co. *vs.* McLaughlin, 73 Fed. 519;
Carnegie *vs.* Hurlburt, 70 Fed. 209;
Bowden *vs.* Burnham, 59 Fed. 752.

practice, was totally unnecessary to advise defendant adequately of the essential nature and basis of the claim.

As administered by the Federal Courts in the year 1925, the practice of the law is no longer a game between opposing lawyers, but an instrument designed to do substantial justice between the parties.

THE TEST IN THE FEDERAL COURTS AS TO WHEN AN AMENDMENT INTRODUCES A NEW CAUSE OF ACTION.

The fundamentally different view taken by this Court as to what constitutes the allegation of a different cause of action in connection with a plea of the Statute of Limitations, and the distinction between this question and that of a matter of pleadings and forms of procedure is forcibly illustrated by contrasting the decisions in *American Railroad* vs. *Birch*, 224 U. S. 547, and in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. 570.

In the first, this Court held that an action under the Federal Employers' Liability Act could not be maintained by the widow, but only by the personal representative. In the second case, the Court sustained the allowance of an amendment, after the limitation period, substituting the personal representative for the widow who had instituted the suit.

This latter case (Ry. vs. Wulf) was an action originally brought by the plaintiff individually under the laws of Kansas for the death of her son, through defendant's negligence while in its employ. Subsequently, after the running of the two years limitation

period prescribed by the Employers' Liability Act, plaintiff was allowed to amend so as to sue under the Federal Statute, and as the personal representative of the deceased. This Court held that in spite of the fact that the amendment for the first time set up the Federal Statute as a basis for her recovery, and for the first time based her claim as administratix instead of in her own right as mother of the deceased, nevertheless the amendment did not state a new or different cause of action, since the original declaration had set out all the basic facts on which plaintiff relied for her recovery.

In the course of the opinion Justice Pitney said (p. 575):—

> "The argument for reversal rests wholly on the mode of procedure followed in the Circuit Court. It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the Federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition, in which for the first time she set up a right to sue as administratrix, alleged an entirely new and distinct cause of action, and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years before she undertook to sue as administratrix.

"It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases, 223 U. S. 1, 53. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

"It is true that under the Federal Statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in American Railroad Co. vs. Birch, 224 U. S. 547. But in that case

there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us; an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within Section 954, Rev. Stat.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather than in substance. Stewart *vs.* Baltimore & Ohio Railroad Co., 168 U. S. 445. *It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit.*"

Illinois Surety Company *vs.* Peeler, 240 U. S. 214, 222, was a suit on a contractor's bond. The original complaint failed to allege the completion and final settlement of the contract between the contractor and the United States, which, under the statute, was a pre-requisite to recovery. This Court approved the allowance, after the limitation period, of an amendment inserting such an allegation, citing Section 954 and Missouri K. & T. Ry. *vs.* Wulf, 226 U. S. 570.

Clearly such an allegation was as essential to the

statement of a valid cause of action as was the allegation of a compliance with Section 18 of the Illinois Practice Act in the Illinois cases relied on by defendants in error, and clearly also, if the Peeler case had been in the Illinois State Courts, it would have been decided the other way.

Similarly, in Friederichsen *vs.* Renard, 247 U. S. 207, this Court, in discussing a transfer, by amendment filed after the Statute of Limitations, of a suit in equity for annulment of a contract, to one at law for damages, said that to refuse this right would be *"to subordinate substance to form of procedure; * * * the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action."* (p. 213.)

So also in *N. Y. Cent. R. R.* vs. *Kinney*, 260 U. S. 340, this Court, speaking through Mr. Justice Holmes, in dealing with the effect of an amendment inserting the essential averment that the carrier was engaged in interstate commerce, said:—

> "The amendment 'merely expanded or amplified what was alleged in support of the cause of action already asserted * * * and was not affected by the intervening lapse of time.' *Seaboard Air Line Ry.* vs. *Renn*, 241 U. S. 290, 293. 'The facts constituting the tort were the same, whichever law gave them that effect.' *Seaboard Air Line Ry. vs. Koennecke*, 239 U. S. 352, 354. See also *St. Louis, S. F. & T. Ry. Co.* vs. *Smith*, 243 U. S. 630. Of course an argument can be

made on the other side, but *when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.*"

The decisions of this Court thus make it clear that the assertion by suit of the *cause of action,* effective to toll the Statute, consists in a clear statement of the *basic facts* on which the claim is founded, and not in a mere statement or elaboration of the *history* of the controversy or of the precise *capacity* in which the plaintiff sues.

In the case at bar, the defendants were notified by the plaintiff corporation on March 20, 1917, that plaintiff intended to hold them legally responsible for the breach of the only contract which ever existed between the parties (Rec. p. 58-9; see also letter of January 18th, Rec. p. 57).

In March, 1918, defendants were officially advised, by the suit instituted, of plaintiff's determination to hold them liable, the declaration setting out the contract and the breach, in six counts, with every conceivable ramification.

There is no thought in this case, but that the defendants had notice of this very claim from the beginning. To permit the plea of the statute to avail defendants would be to return to the days of Lord Coke when "the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared

to the quibbles, refinements, and technicalities of special pleading."

Caldwell, *J.*, in *McDonald* vs. *State of Nebraska*, 101 Fed. 171, 182.

The history, purpose and effect of the liberalization of amendments in the Federal Courts are nowhere more clearly summarized than in *McDonald* vs. *Nebraska*, 101 Fed. 171, 176-182, which was cited with approval by this Court in *M. K. & T. Ry.* vs. *Wulf*, 226 U. S. p. 577, *supra*.

This was a suit by the State Treasurer of Nebraska in his official capacity, to which defendant demurred on the ground that suit should have been brought in the name of the State. The trial Court having allowed an amendment after the period of the statute of limitations, substituting the name of the State as plaintiff, it was held that this was not error, the Court stating that the amendment made no change in the cause of action or in the real parties to the suit. In the course of the opinion Judge Caldwell said:—

> "But, independent of the Nebraska Code and the decisions of the supreme court of that state, we would have no difficulty in upholding the judgment of the lower court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the judiciary act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the

struggle to establish the political independence of their country. When this object had been achieved, and the constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the supreme court of the United States grasped the object and purpose of this enactment. In referring to this section of the judiciary act, the supreme court of the United States, speaking by Mr. Justice Story, said:

" 'The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.) and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of

the soundest protective policy.' ***Matheson's Adm'rs.*** vs. ***Grant's Adm'rs.,*** 2 How. 263, 281, 11 L. Ed. 261.

"And Mr. Justice Miller, speaking from the Circuit Bench, declared:

"'This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the modern codes. It is founded on common sense and justice, and ought to be regarded by the circuit courts as mandatory.'

* * * * * *

"A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. ***But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff.*** The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. ***When a wrong party has been named as plaintiff, the***

action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

* * * * * * *

At the close of the opinion the Court contrasts forcibly the practice of the law as it was in Lord Coke's day, and as it is in the Federal Courts today:

"There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the cause determines its decision, and

> not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and *what is meant by substantial right is a right going to the actual merits of the case.* Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice."

The Federal decisions are full of instances in which the Courts of the United States, acting pursuant to the broad powers and discretion conferred by Section 954, have refused to permit a party to defeat a just claim by taking advantage of a mere error in pleading by the other side, not affecting the substantial rights of the parties and not discovered until after the Limitation period had expired. A recent decision by the Circuit Court of Appeals for the Fifth Circuit is directly in point.

Willits & Patterson *vs.* Texas Refining Company, 2 Fed. (2nd) 547, was a suit by Willits & Patterson, a corporation, brought August 29, 1921, for breach of a contract made in July, 1919. In May, 1924, after the four years Limitation period had expired, plaintiffs asked leave to amend, alleging that Willits had made the contract individually and that it had afterwards been assumed by the plaintiff corporation which he had incorporated after making the contract, to take over the business theretofore conducted by him individually under the same name, Willits & Patterson.

The Circuit Court of Appeals (Walker and Bryan, *C. J.* and Dawkins, *D. J.*) held that the trial Court had erred in sustaining exceptions to the allowance of the amendment, saying (p. 549):—

> "In our opinion the only effect of the amendment in the present case was to permit the introduction of evidence which otherwise might have been objectionable under the petition as it stood. Like the original, it still asserts that the claim is the property of the corporation, and that it grows out of the same contracts and circumstances which were alleged in the original petition. In other words, the claim or cause of action is identical. We do not think that petitioner is required to allege all of his evidence, and the amendment in this case does nothing more than to set forth the history of the entire matter, including the nature of the title under which the plaintiff now owns and seeks to recover of the defendant. A judgment in this case will be con-

clusive, both as to Willits and the corporation. The petition fully advised the defendant of the nature and circumstances of the demand, and, whether it be the property of Willits or the corporation, its rights can be fully safeguarded in whatever decision may be made.

"Our conclusion, therefore, is that the lower Court erred in sustaining the exceptions, and for this reason the judgment is reversed, and the cause remanded, to be proceeded with according to law and views herein expressed."

See also Middlesex Banking Co. *vs.* Smith, 83 Fed. 133;

Dittgen *vs.* Racine Paper Goods Company, 164 Fed. 85, 171 Fed. 631.

Another decision by the Circuit Court of Appeals for the Fifth Circuit is instructive:—

Johnson & Co. *vs.* Staenglen and Muller, 85 Fed. 603, was a suit by Staenglen and Muller against Johnson & Co. on a contract. At the trial it came out that the contract had been made in the name of G. E. Staenglen alone and plaintiff sought to amend, after the limitation period had expired, alleging the making of the same contract by one member of the firm and its subsequent assumption by both. This amendment having been permitted was alleged as error. The Circuit Court of Appeals sustained the judgment for plaintiff on the amended complaint, saying (p. 606):

"It is further insisted that the cause of action set up in defendants' second amended original petition, after plaintiff had taken a nonsuit and the case had been reinstated, was barred by the

statute of limitation. The cause of action was the same as set out in the pleadings after the reinstatement of the case as had been made by the pleadings prior to the nonsuit. The cause of the action was the loss sustained by the plaintiffs in weight, grade, and quality of cotton as classified and allowed in Europe, and the agreement of November, 1886, was set out as the basis or foundation for the claim of Johnson & Co.'s liability for this loss. If the Court below ruled correctly—and we hold that it did—in allowing the contract to go in evidence as one which, under the facts, pleadings and evidence, could be set up by Staenglen & Muller as effective and binding between Staenglen & Muller and Johnson & Co., then there was no such difference between the case before and after the non-suit as would make the latter a new cause of action. Staenglen & Muller were the plaintiffs in the case as made in both instances, and Johnson & Co. were the defendants, the only difference in the two cases being that in the first instance the agreement was declared on as one that had been made originally between Johnson & Co. and Staenglen & Muller, and in the reinstated case as one made originally between Johnson & Co. and G. E. Staenglen, and assumed by Staenglen & Muller with the assent and approval of Johnson & Co. We therefore find no error in the refusal of the Court below to sustain the plea of the statute of limitations."

See also Patillo *vs.* Allen West Co., 131 Fed. 680, where Judge Sanborn of the Eighth Circuit in refusing to sustain defendants' plea of the Statute of

Limitations as applied to an amendment to the declaration, said:—

> "The demand under the amended complaint is for the same items and for the same amount as that under the original complaint."

A recent decision by the Circuit Court of Appeals for the Third Circuit reaches a similar conclusion under the Pennsylvania Death Statute, which, unlike the Federal Act, requires suit to be brought in the name of the widow, as such. In Quaker City Cab Company *vs.* Fixter, 4 Fed. (2nd) 327, plaintiff had sued as administratrix to recover damages under the Pennsylvania Statute for the death of her son. She was permitted to amend, after the statutory period, so as to sue as widow, and this was held proper by the Circuit Court of Appeals, the Court saying:—

> "We think that the amendment was one of form, and not of substance, and in such case an amendment may be made under sections 948 and 954 of the Revised Statutes of the United States (Comp. St. Sections 1580, 1591). *Federal Courts are very liberal in allowing amendments to prevent a miscarriage of justice.* McDonald *vs.* State of Nebraska, 101 F. 171, 41 C. C. A. 278; Murphy *vs.* Stewart, 43 U. S. (2 How) 263, 281, 11 L. Ed. 114; Reardon *vs.* Balaklala Consolidated Copper Co. (C. C.) 193 F. 189."

In an earlier decision, Van Doren *vs.* Pennsylvania Railroad, 93 Fed. 260, the same Court had reached the same conclusion, permitting the plaintiff, who had

brought suit in the District Court of New Jersey for death suffered in Pennsylvania, to amend by bringing suit as widow instead of administratrix, although the statutory period had run.

The Court said (p. 267):—

> "There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted *where substantial justice requires it.*"

The Court then went on to discuss Section 954 permitting the Federal Courts to amend the pleadings, in its relation to Section 914, providing that the practice, pleadings, and forms and modes of proceedings in civil cases in the United States Court shall conform "as near as may be" to those in the State Courts and thus states the rule:—

> "The circuit courts are not bound to conform to state practice or pleadings in subordinate details where such conformity would result in gross or substantial injustice to litigants."

The Court cites decisions of this Court to the effect that the conformity required by Section 914 is required to be not "as near as may be *possible*, or even as near as may be *practicable*," but "as near as may be" thus giving the Federal Courts the "power to

reject, as Congress expected they would do, any subordinate provisions in such state statutes which in their judgment would unwisely encumber the administration of the law *or tend to defeat the ends of justice in their tribunals"* (Railroad *vs.* Horst, 93 U. S. 291).

The necessity for this discussion in the Van Doren case lay in the fact that the State decisions in Pennsylvania are clear against the allowance of such an amendment after the statutory period has expired.

In other words, if the Van Doren case had been in the Pennsylvania State Courts it would have been decided the other way.

See La Bar *vs.* N. Y., Sus. & W. R. R. Co., 218 Pa. 261.

The amendment did not introduce any new or different demand, nor amount to the assertion of a new "cause of action." It was a mere historical elaboration of the "cause of action" theretofore instituted by the party properly entitled to bring suit on it. While proper to avoid a variance between the pleadings and the proof, it in no sense constituted the equivalent of a new suit and when, in the exercise of the discretion of the trial Judge, he allowed it, it related back to the date of filing the original declaration in March, 1918. Clearly the subsequent ruling of the trial Court in sustaining defendants' plea of the Statute of Limitations and directing a verdict for defendants was erroneous, in that it gave effect to form and not to substance, and departed from the

principles adopted by the Federal Courts with regard to the amendment of pleadings.

It is respectfully submitted that the judgment of the Court below was erroneous and should be reversed.

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